No. 94-90

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

WINCHESTER HOMES, INC.,
Petitioner,

v.

HOOVER UNIVERSAL, INC., *et al.*,
Respondents.

Petition For Writ Of Certiorari To The Circuit Court Of Fairfax County, Virginia

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Where no federal question has been presented to or decided by the state courts below, may this Court properly exercise jurisdiction pursuant to 28 U.S.C. §1257?

2. Where the ruling of the state court presented for review does not create or perpetuate a split of authority upon a question of federal law, and where the ruling does not give rise to a federal question of overriding importance, should this Court grant review?

LIST OF PARTIES TO THE PROCEEDING

Petitioner Winchester Homes, Inc. was the plaintiff in the Circuit Court of Fairfax County, Virginia, the court whose judgment is sought to be reviewed.

Respondents Hoover Universal, Inc.; Johnson Controls, Inc.; Ply-Gem Industries, Inc.; Reliance Wood Preserving, Inc.; Mid-Atlantic Wood Preservers, Inc.; Hoover Treated Wood Products, Inc.; Allied Plywood Corporation; and Jarvis Steel and Lumber Co., Inc. were named as defendants in the Circuit Court of Fairfax County, Virginia, along with McCoy Lumber Company; Chesapeake Corporation; Applied Research Group, Inc.; Hickson International Corporation; Hickson U.S.A. Corporation; Osmose Wood Preserving, Inc.; and A.C. Chemical Corp.

Respondents Hoover Universal, Inc.; Johnson Controls, Inc.; Ply-Gem Industries, Inc.; Reliance Wood Preserving, Inc.; Mid-Atlantic Wood Preservers, Inc.; Hoover Treated Wood Products, Inc.; and Jarvis Steel and Lumber Co., Inc. have no parent or non-wholly owned subsidiary companies to list pursuant to this Court's Rule 29.1. Respondent Allied Plywood Corporation's parent company is A-Wood, Inc. Allied Plywood has no non-wholly owned subsidiaries to list pursuant to this Court's Rule 29.1.

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BRIEF IN OPPOSITION

Respondents Hoover Universal, Inc., *et al.*, respectfully request that the Petition for a Writ of Certiorari be denied.

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The rulings of the Circuit Court of Fairfax County, Virginia that petitioner Winchester Homes, Inc. seeks to have reviewed are unreported. *See* App. to Pet. for Cert. 3a, 8a, 19a.

The order of the Supreme Court of Virginia finding no reversible error and refusing to grant discretionary review of Winchester's appeal is unreported. *See id.* 1a. The order of the Supreme Court of Virginia denying Winchester's Petition for Rehearing also is unreported. *See id.* 2a.

GROUND ON WHICH THIS COURT'S JURISDICTION IS INVOKED

Winchester seeks to invoke this Court's jurisdiction pursuant to 28 U.S.C. §1257(a). For the reasons explained herein, this Court lacks jurisdiction over Winchester's Petition for a Writ of Certiorari.

STATUTORY PROVISION INVOLVED

Whether this Court may properly exercise jurisdiction over this case implicates 28 U.S.C. §1257(a). That statute provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. §1257(a).

STATEMENT OF THE CASE

Winchester is a builder of residential homes. From 1981 to 1988, it purchased fire retardant treated plywood manufactured or supplied by one or more of the respondents and others. During that time, Winchester integrated the plywood into the roofs of certain homes that Winchester was building in Virginia. Winchester then sold these homes to various purchasers.

On November 2, 1990, long after Winchester had sold all homes containing the plywood at issue, Winchester brought suit against the respondents who have joined in this Brief in Opposition, and others, in the

Circuit Court of Fairfax County, Virginia claiming that the plywood was defective. Winchester's claims arose exclusively under Virginia state law.

Upon the demurrers of the respondents who have joined in this Brief in Opposition and the other defendants, the Virginia state trial court dismissed all of Winchester's claims, concluding that Winchester lacked standing to assert the claims. Specifically, the trial court ruled that Winchester could not bring a product liability suit in its own right to recover for damages that parties other than Winchester, such as the homeowners, may suffer or have suffered. The trial court's decision that Winchester lacked standing to prosecute its own claims was based wholly upon the trial court's understanding of Virginia law.

Thereafter, the trial court allowed Winchester to assert various claims against respondents as the express assignee and/or subrogee of certain homeowners who had purchased homes containing the allegedly defective plywood. Winchester then obtained such assignments. Later, relying on various state law grounds including expiration of the applicable statutes of limitations, the trial court dismissed all such claims against respondents except one. The remaining claim was Winchester's claim on behalf of the homeowners against Hoover Treated Wood Products, Inc. arising under Article 2 of Virginia's version of the Uniform Commercial Code for breach of warranty.

Winchester took the homeowners' U.C.C. claims against Hoover Treated to trial, where a jury awarded Winchester a verdict totaling $434,185. Following trial, Hoover Treated filed a motion for judgment notwithstanding the verdict. The trial court granted Hoover Treated's motion, ruling as a matter of Virginia law that the homeowners, whose claims were being asserted by Winchester, had no claim under the U.C.C. The trial court reasoned that Article 2 of the U.C.C. concerns itself with the sale of goods, whereas the homeowners

did not purchase goods, but rather realty. The homeowners never purchased plywood when they purchased their homes, as the plywood had already been integrated into the realty.[1]

Once Winchester's suit against all defendants had been disposed of in the trial court, Winchester filed a petition in the Supreme Court of Virginia seeking leave to appeal. As Winchester correctly explains in its Petition for a Writ of Certiorari, "Virginia has no automatic right of appeal in general civil cases such as Winchester's." Pet. for Cert. 5 n.7.

Nowhere in Winchester's Petition for Appeal filed in the Supreme Court of Virginia did Winchester assert that the trial court's rulings denied Winchester's right to due process under the Fourteenth Amendment to the United States Constitution. Instead, Winchester limited its argument in its Petition for Appeal to the contention that the trial court's rulings were erroneous as a matter of state law. In an order dated March 2, 1994, the Supreme Court of Virginia, perceiving no reversible error, refused Winchester's Petition for Appeal. *See* App. to Pet. for Cert. 1a.

Thereafter, Winchester filed a Petition for Rehearing in the Supreme Court of Virginia asking that court to

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1. Winchester maintains that the trial court ruled that Winchester lacked standing to assert claims arising under the U.C.C. as the assignee of townhome purchasers. *See* Pet. for Cert. 4-5. Winchester's assertion mischaracterizes the trial court's ruling.

The trial court ruled, as a matter of substantive Virginia law, that Article 2 of Virginia's version of the U.C.C. allows only claims involving goods, not realty. The state court further ruled that one who purchases a townhome whose roof contains plywood does not purchase plywood as a good but rather purchases realty. Accordingly, the trial court determined as a matter of substantive law that Virginia's version of the U.C.C. does not confer upon the purchaser of *a home* a claim that plywood contained in the home's roof is allegedly defective. Such a ruling does not implicate standing; rather, the trial court held that the homeowners, and Winchester as their assignee, failed to state a claim upon which relief can be granted under Article 2 of the U.C.C.

reconsider its order refusing Winchester's Petition for Appeal. *See id.* 31a-43a. In the Petition for Rehearing, Winchester suggested for the first time that the trial court's dismissal of Winchester's claims, if upheld, might arguably constitute a deprivation of Winchester's right to due process under the Fourteenth Amendment to the United States Constitution. *See id.* 40a-41a.

Specifically, Winchester wrote:

> "In the face of such unmistakable standing rights granted by the [Virginia] Legislature, it was reversible error for the trial court to deny Winchester's standing. Indeed, the reversible error is so great as to violate Winchester's due process rights pursuant to Article I, Section 11 of the Constitution of Virginia and the 14th Amendment to the Constitution of the United States.
>
> "A cause of action for damages is a property right and cannot be taken without due process. And while a litigant is not entitled to any particular result, he or she is guaranteed the substantial right to redress by some effective procedure. Here, because of the denial of standing Winchester has been deprived of any procedure by which to proceed with its cause of action, a cause of action authorized by the [Virginia] General Assembly. *Winchester does not raise this due process argument (nor the separation of powers argument discussed below) as new grounds of appeal*, but simply points them out to demonstrate *why* the actions of the trial court constitute reversible error." App. to Pet. for Cert. 40a-41a (citations and footnote omitted; emphasis added).

Winchester thus made clear that while the Petition for Rehearing contained the first mention of due process, the argument was not even then being "raised" as a ground for appeal. *See id.*

On April 15, 1994, the Supreme Court of Virginia issued an order denying Winchester's Petition for Rehearing. The order stated, in full:

> "On consideration of the petition of the appellant to set aside the judgment rendered herein on the 2nd day of March, 1994 and grant a rehearing thereof, the prayer of the said petition is denied." *Id.* 2a.

On July 14, 1994, Winchester filed its Petition for a Writ of Certiorari in this Court. Therein, Winchester argues that the Virginia courts' rulings denied Winchester its rights to procedural and "substantive" due process in violation of the Fourteenth Amendment to the United States Constitution by denying Winchester access to the courts.[2]

ARGUMENT

I. The Court Lacks Jurisdiction Over This Case

A. Winchester failed to raise, and the state court did not consider, Winchester's federal due process argument

Winchester failed to preserve in the state courts of Virginia the federal questions presented in its Petition for a Writ of Certiorari. As a result, this Court lacks

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2. Winchester's Petition for a Writ of Certiorari incorrectly seeks issuance of the writ to the Supreme Court of Virginia. The Supreme Court of Virginia, however, refused to grant discretionary review of the rulings of the Circuit Court of Fairfax County, Virginia. Both 28 U.S.C. §1257(a) and this Court's rulings, *see, e.g.*, *Virginian Ry. Co. v. Mullens*, 271 U.S. 220, 222 (1926), make clear that a writ of certiorari can issue only to "the highest court of a State in which a decision could be had." Here, due to the Supreme Court of Virginia's declining review, the highest court of Virginia in which a decision could be had upon Winchester's suit is the Circuit Court of Fairfax County, Virginia.

jurisdiction pursuant to 28 U.S.C. §1257(a) to review the judgment of the state court.

Winchester argues in its Petition for a Writ of Certiorari that the trial court's dismissal of its claims against respondents constituted a denial of Winchester's right to due process of law under the Fourteenth Amendment to the United States Constitution. Winchester did not raise this argument in the trial court. Winchester certainly could have raised this argument in its Petition for Appeal filed in the Supreme Court of Virginia but, for whatever reason, failed to do so.

Indeed, Winchester expressly disclaimed that it even intended belatedly to raise the due process argument in Winchester's Petition for Rehearing filed in the Supreme Court of Virginia. *See* App. to Pet. for Cert. 41a.

The record before this Court compels the conclusion that Winchester's federal due process argument was neither raised nor considered by the Virginia state courts. *See Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("when the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary") (internal quotations omitted); *see also Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987) (same); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (same); *Street v. New York*, 394 U.S. 576, 582 (1969) (same).

As a result, this Court lacks jurisdiction pursuant to 28 U.S.C. §1257(a) to review the judgment of the Virginia state court. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing writ of certiorari for lack of jurisdiction where "the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below").

This Court should therefore deny Winchester's Petition for a Writ of Certiorari.

B. Even if Winchester could be deemed to have raised a federal due process argument in its Petition for Rehearing filed in the Supreme Court of Virginia, the argument was raised too late to be preserved for this Court's review

Even if Winchester's Petition for Rehearing filed in the Supreme Court of Virginia could be read as having raised, albeit for the very first time, an argument that the trial court's rulings denied Winchester's federal right to due process, the argument was raised too late to have been preserved for this Court's review.

In *Herndon v. Georgia*, 295 U.S. 441, 443 (1935), this Court explained that "[t]he long established rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it."

Similarly, in *Godchaux Co. v. Estopinal*, 251 U.S. 179 (1919), this Court held:

> "The settled rule is that in order to give us jurisdiction to review the judgment of a state court upon writ of error the essential federal question must have been especially set up there at the proper time and in the proper manner; *and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point*." *Id.* at 181 (emphasis added).

And, in *McCorquodale v. Texas*, 211 U.S. 432 (1908), this Court explained:

> "This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. It is true that we have also decided that if the

> court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than the denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion." *Id.* at 437 (citations omitted).

Accordingly, this Court in *McCorquodale* dismissed the writ of error due to the failure of the plaintiff in error properly to preserve a federal question for this Court's review.

Here, Winchester is in the same position as the plaintiff in error in *McCorquodale*. Winchester is unable to demonstrate that the Supreme Court of Virginia, in denying Winchester's Petition for Rehearing, passed upon the merits of Winchester's federal due process argument, which was raised (if at all) for the first time in Winchester's Petition for Rehearing.[3]

In light of this Court's decisions holding that it is too late for a party to preserve for this Court's review a federal issue raised for the very first time in a petition for rehearing, where the petition does not precipitate a ruling on the merits of the federal issue, this Court should deny Winchester's Petition for a Writ of Certiorari. The record in this case is clear that Winchester has failed to preserve for this Court's review the questions presented in its Petition for a Writ of Certiorari.

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3. Indeed, the Supreme Court of Virginia is prohibited by its own rules of appellate procedure from passing upon the merits of an assignment of error raised for the first time in a rehearing petition. Rule 5:17(c) provides that "[o]nly errors assigned in the petition for appeal will be noticed by this Court." Va. Supr. Ct. R. 5:17(c). Because Winchester did not assign as an error in its Petition for Appeal the trial court's alleged denial of Winchester's right to due process under the Fourteenth Amendment, the Supreme Court of Virginia was prohibited on rehearing from considering the merits of Winchester's fleeting assertion that the trial court's rulings operated to deny Winchester's federal right to due process.

II. The Questions Presented Do Not Merit This Court's Attention

Even if Winchester had preserved its federal due process arguments by asserting these points at the appropriate times while this case was pending in the state court system, this case would still not be appropriate for review on writ of certiorari.

This Court's Rule 10 explains that "[a] petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Rule 10 proceeds to explain that such reasons may be found to exist where a state court's ruling creates or perpetuates a split of authority regarding a matter of federal law or where a case gives rise to a federal question of overriding importance.

The decisions from which Winchester is aggrieved do not meet any of these criteria. The rulings of the Circuit Court of Fairfax County, Virginia do not create or perpetuate any conflict of authority regarding a matter of federal law.[4] Furthermore, while the trial court's rulings

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4. Winchester states in its Petition for a Writ of Certiorari that a split of authority exists among United States Courts of Appeals concerning whether access to the courts should be recognized as a right protected by "substantive" due process. Pet. for Cert. 13-22. Regardless of whether Winchester's assertion of a circuit split is true, in this case the courts of Virginia have not addressed whether access to the courts is a right protected by "substantive" due process. Accordingly, this case does not perpetuate the suggested split and, thus, is not an appropriate vehicle for resolving the split of authority, if indeed one actually exists.

It also deserves to be noted that Winchester's attempt to enlarge the rights afforded to state court litigants under the Fourteenth Amendment does not stop with Winchester's seeking to have this Court recognize a substantive right of access. In footnote 12 on page 12 of its Petition for a Writ of Certiorari, Winchester asserts that the state trial court's grant of judgment notwithstanding the verdict in favor of Winchester's adversary following trial "deprived [Winchester] of its right under the Seventh Amendment to have a jury decide the merits of its claim." Pet. for Cert. 12 n.12. Winchester's argument overlooks that this Court has held that the

as to matters of Virginia law are of importance to Winchester, those rulings do not give rise to any federal question of overriding importance.[5]

Winchester's Petition for a Writ of Certiorari seeks review of a Virginia state trial court's rulings construing Virginia's Uniform Commercial Code and applying Virginia law governing when a litigant has standing to assert claims. In its Petition for a Writ of Certiorari, Winchester tries valiantly to make a federal case out of a Virginia state trial court's rulings upon matters limited purely to Virginia law. No amount of effort or creativity, however, can make this case worthy of review by the Supreme Court of the United States.[6]

As a result, this Court should deny Winchester's Petition for a Writ of Certiorari.

Seventh Amendment of the United States Constitution does not apply to trials conducted in state courts. *See Minneapolis & S.L. R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916) ("the Seventh Amendment applies only to proceedings in courts of the United States and does not in any manner whatsoever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same"); *see also Hattaway v. McMillian*, 903 F.2d 1440, 1451 n.16 (CA11 1990) ("the seventh amendment does not apply to state court proceedings").

5. Respondents disagree with Winchester's assertions that the trial court's rulings are incorrect as a matter of Virginia law. However, mindful of the fact that this Court does not sit as the final arbiter of Virginia law, respondents will forego a recitation of the reasons why the trial court's rulings are correct as a matter of state law. It should suffice for present purposes to note that the actual final arbiter of Virginia law, the Supreme Court of Virginia, was apparently not impressed with Winchester's arguments under state law that the trial court's rulings were erroneous and accordingly denied Winchester's Petition for Appeal.

6. In any event, Winchester's argument that it has been denied access to the Virginia state courts rings hollow. The trial court permitted Winchester to amend and re-amend its pleadings numerous times in an attempt to state viable claims. Winchester took its U.C.C. claim against respondent Hoover Treated Wood Products, Inc. to trial and, thereafter, to verdict. Even if Winchester possessed a Fourteenth Amendment right of access to the courts, the record does not support Winchester's assertion that its right of access has been denied.

CONCLUSION

For the foregoing reasons, this Court should deny Winchester's Petition for a Writ of Certiorari.

Respectfully submitted,

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